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Food Advertising and Obesity Prevention: What Role for the European Union?

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Abstract

When the Television Without Frontiers Directive (“TVWF Directive”) was first adopted in 1989, there was very little discussion on how food advertising should be regulated at Community level. However, things have changed as a result of rising levels of obesity in all EU Member States. Consequently, several stakeholders have suggested that the advertising of unhealthy food to children should be restricted. This article analyses whether and how, bearing the obesity epidemic in mind, the European Union could regulate the marketing of food high in fat, sugar and salt to children (“HFSS food”). It starts by presenting the evidence supporting such regulation. It then focuses on the contribution which the TVWF Directive and the proposed Audiovisual Media Services Directive (“AVMS Directive”) could make to the debate. It finally looks at the broader regulatory framework by discussing their relationship with other instruments of Community law relating to food advertising, and in particular the Unfair Commercial Practices Directive (“UCP Directive”) and the recently adopted Regulation on nutrition and health claims made on foods.

Keywords:

Obesity, Food Advertising to Children, Audiovisual Policy

Introduction

The “obesity risk” has become a major concern of the food industry since the World Health Organisation has recognised obesity as a problem of epidemic proportion (WHO, 1998).¹

¹ The primary measure of overweight and obesity is Body Mass Index, or BMI. BMI is calculated as weight in kilograms divided by height in meters squared. Optimal

Levels of overweight and obesity have increased dramatically in all EU Member States, affecting 30% of the population in 2006 (Commission 2007a, p. 2). In Cyprus, the Czech Republic, Germany and Greece, the combination of reported overweight and obesity in men even exceeds 70% (IASO, 2007). The trend is even more pronounced for children and adolescents, with the number of EU school children affected by overweight and obesity estimated to be rising by around 400,000 a year, adding to the 25% children who are already overweight. This is particularly worrying as an obese child is very likely to become an obese adult (IOTF, 2005).

Since several health threats are associated with obesity – not least cardiovascular diseases, cancers, and type 2 diabetes, it already accounts for up to 7% of direct health care costs in the European Union. This figure does not include indirect costs to the economy, resulting notably from lost days of productivity – which have been estimated at £2 billion in the UK alone. The total direct and indirect costs of obesity in 2002 in the EU 15 were estimated to be EUR 32.8 billion (Commission 2007b, par. 4.1). Consequently, fighting obesity is important for public health reasons generally but also to “reduce the long-term costs to health services and to stabilise economies by enabling citizens to lead productive lives well into old age”, so as to make the European economy more competitive (Commission 2005a, par. II.4). It is therefore not surprising that better health is part of the Lisbon Agenda (Commission 2007b, par. 3).²

Determining the causes of obesity is central to defining an effective prevention policy. Nevertheless, in light of the multi causal character of the epidemic, the task is far from straightforward. This is why various strategies have been put in place at all levels (local, national, regional and global) with a view to deciding how

BMI levels are generally believed to lie between 20 and 25. Persons with a BMI between 25 and 30 are considered overweight, and those with a BMI above 30 are obese.

² Legal intervention is all the more justified to curb the current trends, as income and obesity are negatively associated, particularly for women (Cutler, Glaeser and Shapiro 2003; Poulain 2002).

best to address the two sides of the energy equation: food intake and physical activity.³

This article concentrates on one particular aspect of obesity prevention, namely the role that the European Union can play to curb the epidemic by regulating how food is marketed to consumers, not least children. It is not suggested, of course, that the food industry bears all responsibility for the current state of play. It is argued, however, that the industry has its share of responsibility, not least because of the link that has been established between the nature of advertising and children's eating habits. If advertising for food high in fat, sugar and salt ("HFSS food") alone does not make children fat, it is an important contributory factor to their overweight.

As the regulation of television advertising to children for HFSS food has been fiercely contested by members of both the food and the advertising industries, this article starts by briefly reviewing the evidence supporting action in this field. It then focuses on the TVWF Directive and argues that it contains significant gaps which restrict its potential to effectively support any obesity prevention strategy, and that the anticipated AVMS Directive does not go far enough to improve the existing regulatory framework. The final part considers the relationship between the TVWF/AVMS Directive and other provisions of Community law relating to food advertising and consumer protection, and argues that the legal landscape lacks clarity and contains loopholes.

1. The Evidence Supporting a Restriction of HFSS Food Advertising to Children

If it is now clearly established that advertising influences children, it is only recently that a growing body of research has focused specifically on the impact of

³ The EU set up a discussion forum relating to issues of nutrition, diet and physical activity in March 2005 (EU Platform for Action on Diet, Physical Activity and Health); further information is available at:
http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/platform_en.htm

food advertising on eating habits. This research has generated concerns in relation to the rise of childhood obesity in Europe and has identified television advertising as an area where action should be considered to restrict the promotion of HFSS food to children.

Following the industry's claim that the relationship between eating patterns and television advertising had not been established, various regulatory authorities commissioned independent research to explore whether there was a correlation between weight gain and the amount of HFSS food advertising children were exposed to. The evidence gathered so far suggests that such a correlation does indeed exist.

In the United Kingdom, the Food Standards Agency ("FSA") commissioned a report which indicates that television advertising leads to an increase in consumption not only of the product of a given brand, but also of all the products of the category in question (Hastings et al. 2003). In other words, not only will children prefer Coca-Cola to Pepsi if they see an advertisement for the former – presumably all the more so if David Beckham features in it – but they will also increase their consumption of fizzy sugary drinks to the detriment of other categories of drinks such as water, milk or fruit juices.

In 2003, the Secretary of State for Culture, Media and Sport asked Ofcom, the independent regulator for the UK communication industries, to consider proposals for strengthening the rules on television of food advertising aimed at children. In response, Ofcom commissioned research into the role played by television advertising in influencing children's consumption of HFSS food. The report which followed concluded that advertising had a modest, direct effect on children's food choices and a larger but unquantifiable indirect effect on children's food preferences, consumption and behaviour (Livingstone 2004). On this basis, Ofcom acknowledged, while noting the multiple factors accounting for childhood obesity, that there was a case for proportionate and targeted action in relation to television advertising to address this public health issue (Ofcom 2006). These findings were confirmed by the public consultations Ofcom carried out in 2005 and 2006. As a result, an advertising ban has been introduced in the United Kingdom for HFSS food in and around children's television programmes, as described in more detail below. Similarly, on the basis of

evidence gathered in the UK and in the USA, the French Agency for Food Safety (“AFSSA”) stated in July 2004 that the prohibition of food advertising to children was a logical and proportionate response to the growth of childhood obesity. This suggestion, however, has not been upheld so far by the French legislature.

More recent findings confirm that food advertising influences childhood obesity levels. A study by a team of psychologists from the University of Liverpool recently established that obese and overweight children increased their food intake by more than 100% after watching food advertisements on television. A group of 60 children of varying weights, aged between 9 and 11, were shown a series of both food television adverts and toy adverts, followed by a cartoon. Food intake following the food adverts was significantly higher compared with the toy adverts in all weight groups, with the obese children increasing their consumption by 134%; overweight children by 101% and normal weight children by 84%. This study also found that weight dictated food preference during the experiment. Food of differing fat contents was made available to the children to eat at their own will, ranging from high fat sweets snacks to low fat savoury products. The group of obese children consistently chose the highest fat product – chocolate – whereas the overweight children also chose jelly sweets which have a lower fat content, as well as chocolate (Halford et al. 2007).⁴

Academic, independent findings are supported by surveys undertaken by various interests groups. In particular, the *UFC-Que-Choisir* – the main consumer association in France – published a survey in September 2006 which shows that television advertising does influence children’s eating habits by promoting HFSS food. More specifically, the survey, which was carried out on the basis of interviews of 352 families and 704 persons, concludes that:

1. Overall, advertising actively contributes to the development of children’s food preferences. Between meals, 60% of them request highly sugary snacks (such

⁴ It would arguably be useful to undertake similar research using a larger sample of children to reinforce these findings.

as cakes, croissants, sweets) and 64% breakfast cereals with the highest sugar contents – products for which massive advertising investments are made.

2. Beyond children's preferences, advertising impacts on families' eating behaviour. In cupboards and fridges, sugary cereals are overrepresented (31%), with nearly one out of two breakfast products having a completely unbalanced nutrition profile.
3. Children who are the most exposed to television, and therefore to television advertising (30% of the sample) have, in their family cupboards and fridges, an even stronger proportion of HFSS food designed for snacks and breakfast.

These findings have led the *UFC-Que-Choisir* to reinforce its support for the AFSSA's recommendation that HFSS food advertising should be banned during children's television programmes (UFC-Que Choisir 2006).⁵

The existing evidence therefore points to a link between the intensity of children's exposure to HFSS food advertising and their eating behaviour. Beyond their effects on brand choice, food advertising promotes over-consumption. Consequently, it seems important that obesity prevention strategies take this factor into account. The rest of the article focuses on the legislative framework in place at Community level for the regulation of HFSS food advertising.

2. The Relevance of the TVWF/AVMS Directives to the EU Obesity Prevention Strategy

When the TVWF Directive was first adopted in 1989, and subsequently revised in 1997, obesity was not high on the political agenda. It is therefore not surprising that its provisions do not contain any rules specifically designed to tackle this public

⁵ The association also advocates that the notion of children's programmes should be redefined to take into account Ofcom's findings that 71% of the time children spend watching television is outside the time specifically designed for children.

health concern. Since then, however, the issue has become a political priority and an integral part of the debates surrounding the revision process of the TVWF Directive.

As discussed more fully elsewhere in this journal, the TVWF Directive was adopted on the basis of Articles 47 and 55 of the EC Treaty to improve the proper functioning of the internal market. Its aim is to promote the free movement of broadcasting services between the Member States. To this effect, it is based on the State of establishment principle: broadcasters must comply with the legislation of the Member State in which they are established; if they do, they are free to retransmit their programmes in all the Member States without hindrance. Only narrow exceptions are provided for in the Directive. Nevertheless, to make the freedom of broadcasting services acceptable to Member States, the Directive lays down minimum standards which they must all implement in their national legal orders.

Certain of these requirements deserve closer scrutiny, as they could potentially have a role to play in the restriction of HFSS food advertising to children. In relation to the content of advertising, two provisions of the TVWF Directive as currently drafted could be relevant to obesity prevention:

1. Article 12 which prohibits advertising encouraging “behaviour prejudicial to health and safety”, and
2. Article 16 which provides that “advertising shall not cause moral or physical detriment to minors”.

I will argue that these provisions contain a number of significant gaps which restrict their potential to support effective obesity prevention strategies, and that the progress made in the revision process which the Directive is undergoing does not go far enough to improve the existing regulatory framework.

2.1. Article 12 of the TVWF Directive

Article 12(d) of the Directive provides that “television advertising and teleshopping shall not encourage behaviour prejudicial to health or to safety.”

However, the Directive leaves the phrase “behaviour prejudicial to health or to safety” undefined.

It is arguable that Article 12 could be invoked to restrict advertising for HFSS food, as the repeated consumption of such food is undoubtedly prejudicial to health. This is precisely what several stakeholders called for during the consultation process which led to the publication of the first Commission proposal for the AVMS Directive. In particular, the European Heart Network argued that “if the concepts of [Articles 12 and 16] had been fully respected, food advertising to children would already have been restricted or banned given the link between such advertising and health outcomes [...]”.⁶ Alternatively, the Directive could be amended to insert a new article restricting HFSS food advertising to children, by analogy with Article 15(a) which bans alcohol advertising directed to them.

Notwithstanding these calls, the first proposal which the Commission published on 13 December 2005 did not contain the slightest reference to food advertising. It is regrettable that the Commission did not take up this opportunity to acknowledge the existence of the problem at an early stage in the legislative process. However, the Hieronymi’s report, a European Parliament’s report of 22 November 2006, suggested that the Commission’s proposal should be amended as follows: “audiovisual media services directed at children may not contain any form of audiovisual commercial communications or teleshopping for food or drink in accordance with the principles laid down in the Health Claims Regulation”.⁷ The justification given for the amendment precisely was the growth of obesity among EU children: “the promotion of unhealthy foods to children is decisive in children diet’s choices. Therefore there

⁶ See in particular the contributions to the Commission consultations of 2003 and 2005 of EHN, BEUC, NHF and Diabetes UK. European Commission, Consultations on the Amendment of the TVWF Directive, 2003 and 2005, respectively available at: http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation_2003/contributions/index_en.htm
http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/consultation_2005/contributions/index_en.htm

⁷ Amendment 119.

should be no advertising of such food at least before, during and after children's programmes."

Despite the fact that the reference to the Health Claims Regulation was somehow ambiguous, this proposed amendment had the advantage that it would have limited the exposure of children to HFSS food advertising. The European Parliament nonetheless preferred a self-regulatory approach to the issue of HFSS food advertising to children, which the Commission upheld (Commission 2007c). Article 3d(2) of the consolidated proposal for the AVMS Directive provides that "Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programming, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended." (Commission 2007d)

This approach is in line with the position which the Commission Directorate General on Health recently adopted on the same issue in its White Paper "A Strategy for Europe on Nutrition, Overweight and Obesity related health issues" which provides that "the Commission's preference, at this stage, is to keep the existing voluntary approach at EU level due to the fact that it can potentially act quickly and effectively to tackle rising overweight and obesity rates." (Commission 2007a, p. 6) Yes, "potentially" ...⁸

One cannot help noticing that self-regulation, which the Inter-institutional Agreement on better lawmaking has defined as "the possibility for economic operators [...] to adopt amongst themselves and for themselves common guidelines at European level",⁹ has failed so far to address the issue of HFSS food advertising to children, despite the pressing nature of the issue. The example of the United Kingdom

⁸ On the contribution which self-regulation can make in the EU advertising sector, see the following report of some discussion among interested parties, July 2006:

http://ec.europa.eu/consumers/overview/report_advertising_en.pdf

⁹ OJ 2003, C 321/1, at paragraph 22.

is particularly revealing where Ofcom felt compelled to introduce a ban on HFSS food advertising in and around children's programmes, following the failure of the food industry to respond to the warning given in the White Paper "Making Healthy Choices Easier" published by the Department of Health in November 2004.

It is even more illogical to expect the food industry to curb its current practice of bombarding children with HFSS food advertising when one considers its considerable investments in such advertising campaigns. Indeed, it has been estimated in the UK that the total advertising spend of all types of food, soft drinks and chain restaurants in 2003 at £743million, whereas the Government food campaign spend amounted to £7million in 2004 (Department of Health 2004). Can the Commission realistically expect the industry to define and enforce effective standards which would significantly reduce the exposure of children to HFSS advertising? Self-regulation is an extremely contentious regulatory mechanism when massive financial interests are at stake. It is perhaps not surprising that the Commission is reluctant to adopt binding legislation which would limit the freedom of the industry to market HFSS food to children when one knows that the food and drinks industry is the second largest manufacturing sector, accounting in 2001 for 11% and 13% of total EU manufacturing value added and employment, respectively (Commission 2007b, par. 4.2).

The Commission will review the progress made by the industry in 2010. By then there will be a new Commission, and the number of obese people is very likely to have further increased. It is therefore a false pretence to suggest that the reason for relying on self-regulation is to guarantee better law making in the interest of European citizens. The consultation of stakeholders which led to the publication of the White Paper was very clear: industry representatives were in favour of self-regulation, whereas consumer and public health associations were forcefully against (Commission 2006a, p. 13). A bit more courage from the Commission on this issue would have been welcome.

Two further criticisms can be made of Article 3d (2). First, its wording is unclear. In particular, the phrase "inappropriate audiovisual commercial communication" seems to give an extra margin for manoeuvre to the food industry by

diluting its obligation to limit HFSS food advertising to children. If one could argue that all adverts for HFSS food directed at children are inappropriate, this is not what the wording of Article 3d (2) suggests. On the contrary, it implies that there are appropriate and inappropriate HFSS food adverts, with the industry having to tackle only the latter in its codes of conduct. One could imagine that using celebrities or cartoon characters would be viewed as inappropriate, as these techniques detract children's attention away from the actual product, whereas adverts that would not rely on such techniques would not be regarded as “inappropriate”. Such an approach would be extremely cynical, as it would leave the industry with even more freedom regarding the content of its codes of conduct.

Moreover, Article 3d (2) only requires the industry to limit inappropriate HFSS food advertising “accompanying or included in children's programming”; but nowhere does the draft AVMS Directive define what is meant by “children's programming”. The Hieronymi's report noted this shortcoming and suggested in Amendment 35, “in the absence of a uniform EU-wide definition of 'children' and 'children's programmes' for the purposes of this directive”, that New Recital 33A be inserted in the Preamble: “In order to reach an adequate level of protection of minors, the national regulatory authorities should determine time-zones for children and define the programmes aimed at children.” This consideration is important in light of Ofcom's findings that 71% of the time children spend watching television is outside the time specifically designed for children. The logical consequence therefore is that if too narrow a definition of the notion of “children's programme” is adopted either by Member State legislation or by self-regulatory codes of conduct, children will not be sufficiently protected from the adverse effect of HFSS food advertising. The issue is not mentioned in the Commission's latest proposal (Commission 2007c).

Little reassurance can be found in Article 26, second paragraph, which provides that the periodic report the Commission will have to submit to the European Parliament, the Council and the Economic and Social Committee will need to “assess the issue of advertising accompanying or included in children's programmes, and in particular whether the quantitative and qualitative rules contained in this Directive have afforded the level of protection required.” But what is “the level of protection required”? The threshold set to date seems rather low.

2.2. Article 16 of the TVWF Directive

Article 16 also deserves close scrutiny. It provides as follows:

“1. Television advertising shall not cause moral or physical detriment to minors and shall therefore comply with the following criteria for their protection:

(a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised [...]

The ambit of this article, which goes far beyond food advertising, is controversial. In particular, the use of the word “directly” in paragraph 1(a) and (b) seems to suggest that it should be interpreted restrictively. There are in fact few examples of advertisements which directly call on children either to buy a specific product or to use their “pester power” so that their parents buy this product for them. Advertising to children is mainly covert: it attracts their attention in such a way that they will want a product. That has become even more so with the development of various new marketing techniques, such as the use of celebrities, character merchandising... For example, McDonald’s advertises its Happy Meals by using cartoon characters. The problem, however, is that the use of these characters is not related to the actual content of the box. It can therefore be argued that this technique is an exploitation of children's inexperience and credulity. The Market Court in Finland ruled, on the basis of the Finnish Consumer Protection Act, that a McDonald’s commercial violated the Act by presenting Happy Meal Toys as the “main message in spots, at the expense of the main product” (that is, the Happy Meal). In making the core of the commercial a toy and the main objective attracting children, McDonald’s, the court ruled, was deliberately taking consumer attention away from the advertised product (the meal) and the commercial was thus deemed an “inappropriate” form of advertising. The Market Court consequently ordered that the commercial be withdrawn (Hawkes 2004a, p. 7). It remains that the wording of Article 16 is so restrictive that such a commercial would never be considered as a

“direct” exploitation within its terms, despite its detrimental impact on children’s economic behaviour and food preferences. It could however potentially fall within the scope of the Unfair Commercial Practices Directive, as discussed below.

Despite the calls of consumer and medical associations for a clearer, broader formulation, the prospects for an extension of the scope of Article 16 are not promising. The Hieronimy’s report suggested an extension of the prohibition laid down in Article 16 to indirect exhortation: “audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore, it shall not directly *or indirectly* exhort minors to buy a product or service by exploiting their inexperience or credulity, directly *or indirectly* encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, *especially role models or persons exercising authority*, or unreasonably show minors in dangerous *or degrading* situations *unless justified for learning or training purposes*”.¹⁰ If it is welcome that the AVMS Directive will apply to other media than television, not least the Internet, it remains that Article 16 will not cover “indirect” exhortations to children to buy or put pressure on their parents to buy HFSS food.¹¹ This arguably represents a failure to take into account the best interest of the child, which is all the more regrettable in light of the Commission’s Communication of July 2006 which undertook that EU institutions would mainstream children’s rights in all Community policies. One could have hoped that this Communication was intended to put some flesh on the bones of Article 24 of the EU Charter of Fundamental Rights which provides, in its second paragraph, that “in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a

¹⁰ Amendment 68 (emphasis contained in the original text).

¹¹ Article 3d(1)(f) of the consolidated proposal of the Commission of 24 May 2007 provides that “audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore they shall not *directly* exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, *directly* encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations” [Emphasis added].

primary consideration”, which would have made children’s rights more visible in the Community legal order (Commission 2006b).¹² Unfortunately, the financial interests of the food and advertising industries have long been more influential on policies than the well-being of our children (Bénilde 2007; Nestle 2002).

2.3. A measure of minimum harmonisation

It is true that Member States have relied on the fact that the TVWF Directive is a measure of minimum harmonisation to adopt stricter national standards. Article 3 states that “Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive.” Consequently, it is open to Member States to adopt requirements going beyond the minimum laid down at Community level by Articles 12 and 16 in relation to HFSS food advertising to children either by imposing scheduling restrictions on television advertising directed at children or by regulating food advertising.

Several Member States have used this possibility. For example, Sweden has banned advertising directed at children under the age of 12 since 1991.¹³ As regards food advertising more specifically, France has introduced an obligation on food companies wishing to advertise HFSS foods to insert a health message in their adverts.¹⁴ The United Kingdom has adopted, following an extensive consultation process, measures that go much further. These measures include a total ban of HFSS

¹² See also Article I-3(3), second paragraph, of the Draft Constitutional Treaty: “[The Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and *protection of the rights of the child*” [Emphasis added].

¹³ Case C-34/95 *De Agostini* [1997] ECR I-3843.

¹⁴ The Act of 9 August 2004 on Public Health, as amended, introduced New Article L. 2133-1 of the Public Health Code, as implemented by secondary legislation (*Décret* 2007-263 of 27 February 2007 – NOR: SANP0720072D, and *Arrêté* of the same date, NOR:SANP0720073A). All these documents are available on the Légifrance website at <http://www.legifrance.gouv.fr/>

food advertising in and around all children's programming and on dedicated children's channels as well as in youth-oriented and adult programmes which attract a significantly higher than average proportion of viewers under the age of 16. In addition to general content rules requiring responsible advertising to all children at all times, Ofcom has also introduced new rules on the content of advertisements targeted at primary school children which ban the use of celebrities and characters licensed from third-parties (such as cartoons), promotional claims (such as free gifts) and health or nutrition claims.¹⁵

Nevertheless, the freedom which Member States have is limited, insofar as the TVWF Directive requires that they comply with the twin principles of "the State of establishment" and "mutual recognition". As Article 2a provides, "Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive." This principle will remain the core of the AVMS Directive, as it is essential for the creation of an internal market in audiovisual services. It is therefore all the more necessary to ensure that public interests objectives are protected at a sufficiently high level all across the Community.

The European Court of Justice explicitly confirmed that Member States were bound to accept broadcasts from other Member States, without being able to apply the stricter national standards which they may impose on national broadcasts. In its *De Agostini* judgment of 1997, it ruled that Sweden was prevented from applying to television broadcasts from the United Kingdom its domestic law provision which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children of less than 12 years old. On the other hand, the Court did not rule that Sweden could not enforce its ban on children advertising for broadcasts emanating from its own territory, insofar as "Article 3(1) does not contain any restriction as regards the interests which the Member States may take into consideration when laying down more strict rules for television broadcasters established in their territory", subject to their compliance with Articles 28 and 49 of the Treaty on the free movement of goods and services respectively.

¹⁵ Details can be found on Ofcom's website at:

http://www.ofcom.org.uk/consult/condocs/foodads_new/

The TVWF Directive thus limits the freedom of Member States to implement coherent strategies aimed at curbing obesity levels on their territories. This reinforces the need for Community institutions to take a high level of public health as a basis for action, as Articles 95(3) and 152(1) of the Treaty expressly require.

In light of the problems relating to the scope and scheme of the Directive, the BEUC called, as early as 1996, on EU institutions to adopt a horizontal piece of legislation to protect children in relation to all forms of marketing practices, whatever the medium, and covering all products and services.¹⁶ This suggestion is not realistic in light of the principle of attributed competence. As the *Tobacco Advertising* litigation has made clear, some advertising regulation does not affect cross-border trade and cannot be adopted on the basis of Article 95 EC.¹⁷ The issue nonetheless remains that the TVWF does not provide sufficient means to address the issue of HFSS food advertising to children.

The next question therefore arises: beyond the little comfort which the TVWF Directive offers, are there other texts of Community law that can be invoked to support obesity prevention strategies by limiting the exposure of EU children to HFSS food advertising?

3. The Relationship between the TVWF Directive and Other Instruments of Community Law

The Unfair Commercial Practices Directive (“the UCP Directive”), which entered into force on 12 June 2005, introduces the first EU-wide ban on all unfair business-to-consumer commercial practices.¹⁸ Member States should have adopted the necessary implementing measures by 12 June and must ensure that they are fully

¹⁶ See, for example, BEUC, “Children and advertising – Summary of the BEUC/CB survey”, X/001/2000.

¹⁷ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

¹⁸ Directive 2005/29/EC, OJ 2005 L 149/22.

complied with by 12 December 2007 (Bakardjieva-Engelbrekt 2005; Garde and Haravon 2007; Howells et al. 2006; Stuyck et al. 2006; Weatherill and Bernitz 2007).

The UCP Directive constitutes one step in the direction suggested by the BEUC, without however going beyond the scope of Community competence. Its key provision is Article 5 which prohibits all unfair business-to-consumer commercial practices. To be considered unfair, a practice must meet two criteria: it must be contrary to the rules of professional diligence and materially distort or be likely to materially distort the economic behaviour of a consumer, that is “to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision which he would not have taken otherwise.”¹⁹ After laying down this extremely broad prohibition, the Directive identifies two main categories of unfair commercial practices: misleading and aggressive practices. Under Articles 6 and 7, a practice is misleading if it contains false information, omits material information or presents it in an unclear, unintelligible, ambiguous or untimely manner, or otherwise deceives or is likely to deceive the average consumer. Under Articles 8 and 9, a practice is aggressive if by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product. In order to give a more concrete flavour to these general definitions, Annex I of the Directive lists 31 commercial practices which are considered unfair in all circumstances. The list, which is applicable in all the Member States and can only be modified by revision of the Directive, is not exhaustive.²⁰ However, if a consumer claims that his economic behaviour has been distorted as a result of a practice which is not listed, he will have to establish that the practice is indeed unfair. The list therefore reverses the burden of proof by laying down a presumption of unfairness. In other words, if Annex I is not

¹⁹ Article 2(e).

²⁰ Article 5(5).

exhaustive of all unfair commercial practices, it is exhaustive of commercial practices which are presumed to be unfair.²¹

With regard to advertising to children more specifically, Point 28 of the Annex provides that “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” is an aggressive commercial practice; it is therefore prohibited in all circumstances. The relationship of this provision with Article 16 of the TVWF Directive is extremely complex and is likely to give rise to tough questions of interpretation. A partial answer is to be found in the wording of the UCP Directive. Point 28 *in fine* provides that the UCP Directive is without prejudice to Article 16 of the TVWF Directive. What could, however, appear as a relatively straightforward principle aimed at ensuring the coherence of Community law may give rise to a great deal of legal uncertainty in practice.

3.1. Health as opposed to economic interests

The starting point to assess the respective fields of application of these two directives should be the objectives they pursue. The UCP Directive aims to ensure that consumers' freedom of choice is not affected when they enter into commercial transactions with businesses. It focuses exclusively on consumers' economic interests, and this is true even when the consumer is a child. As Paragraph 19 of the Preamble states, “where certain characteristics such as age [...] make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.”²²

²¹ The Commission believes that by defining only what should be prohibited, the Directive thus leaves room for business to innovate in developing new, fair commercial practices.

²² This is reflected in Article 5(3).

By contrast, the TVWF Directive protects interests which are not all economic in nature (Bakardjieva-Engelbrekt 2005, p. 58). In particular, Article 16 prohibits advertising which causes “moral or physical detriment to minors”. This phrase seems to suggest that health and safety concerns fall within the scope of the TVWF Directive. This is confirmed by Article 12 on the prohibition of advertising prejudicial to health or safety, Article 13 on the prohibition of tobacco advertising, Article 14 on the prohibition of medicinal products and medical treatments advertising, Article 15 on the limitations imposed on alcoholic beverages advertising and Article 17 on the prohibition of sponsorship by companies involved in the manufacture or sale of tobacco or medicinal products or medical treatments. By contrast, health and safety matters are explicitly excluded from the scope of the UCP Directive, which states in Article 3(3) that it is “without prejudice to Community or national rules relating to the health and safety aspects of products.” Member States are therefore able to “retain or introduce restrictions on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to alcohol, tobacco or pharmaceuticals.”²³

Where does that leave us as regards obesity prevention? If we accept that obesity is a health issue, Member States may introduce national legislation which would aim to reduce the scope of the epidemic. They can, however, do so only for measures which do not fall within the coordinated fields of the TVWF Directive. Indeed, as Articles 12 and 16 suggest, the TVWF Directive coordinates the laws of the Member States on advertising, including the laws adopted on health and safety grounds which affect television services – and audiovisual services more broadly defined once the amended directive enters into force. Consequently, in light of what has been explained above, Member States may not, as Community law currently stands, prevent television advertising coming from other Member States on the ground that these broadcasts may be detrimental to children's health, and more specifically prejudicial to their diets. In light of the Community legislature's refusal to introduce legally binding restrictions on HFSS food advertising to children, the transmitting State principle will make it impossible for Member States to justify

²³ Recital 9 of the Preamble.

national legislation adopted with this aim in mind to prohibit broadcasts from other Member States containing such advertising.

Member States could therefore find themselves in the somewhat paradoxical situation that a measure such as the TVWF Directive, which purports to take into account health and safety interests, may be much less protective of these interests than the UCP Directive, which does not cover them but allows Member States to adopt national measures dealing with such interests.

Once the AVMS Directive enters into force, the effect of the TVWF Directive will be extended to several other media, not least radio communications and the press. Nevertheless, the regulation of certain media will still fall outside its scope. In relation to the media not covered by the provisions of the AVMS Directive, Member States will be free to regulate them, subject to the limits set by the European Court of Justice in its interpretation of the general Treaty provisions on the free movement of goods (Article 28 EC) and services (Article 49 EC). Bearing in mind the Court's generous approach to national restrictions to free movement introduced on grounds of public health protection, these articles should not constitute difficult hurdles, provided a given measure is not a disguised restriction on trade.²⁴

Does that mean, however, that there is no scope for relying on the UCP Directive in assessing HFSS food advertising directed at children? If such was the case, what would be the relevance of Point 28 of Annex I? A further distinction must be drawn at this stage. If the concern relates only to the health and safety of a foodstuff, the UCP Directive is not applicable as a result of the express exclusion of health and safety concerns from its scope. However, one may rather be concerned that a given advertisement is aggressive or misleading – for example that it is presented as healthy when it has in fact poor nutritional qualities and a high calorie, fat, sugar or salt content. Such adverts could well “materially distort or be likely to materially distort the economic behavior” of consumers –children or their parents, and therefore fall within the scope of the UCP Directive as unfair commercial practices.

²⁴ See in particular Case C-429/02 *Bacardi France* [2004] ECR I-6613.

The case of *De Agostini* sheds light on the issue. Apart from the lawfulness of the Swedish ban on television advertising discussed above, the question also arose in this case whether the TVWF Directive prevented Member States from prohibiting advertisements from other Member States on their territories on the ground that they misled consumers. In its submissions, De Agostini argued that the statement that children could get the model dinosaur for “6.50 Swedish crowns only” infringed Sweden's general law on unfair commercial practices, as 6.50 crowns was the price of one issue of the magazine only and not of the dinosaur as such. The principle that broadcasts were to be controlled by the State having jurisdiction over the broadcaster would be seriously undermined in both its purpose and effect if the Directive were held to be inapplicable to advertisers and that a restriction relating to advertising had an impact on television broadcasts, even if the restriction concerned only advertising. By contrast, the Consumer Ombudsman argued that the TVWF Directive did not address the issue of misleading advertising, thus leaving Member States free to apply their laws on misleading advertising to both domestic and foreign broadcasts alike. The Court accepted this line of reasoning and held as follows:

“ 37. [...] it is sufficient to observe that [the Misleading Advertising Directive],²⁵ which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature [...].

38. It follows from the foregoing that the Directive does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do

²⁵ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.”

The European Court of Justice therefore confirmed that the TVWF Directive did not apply to misleading commercial practices. This judgment remains relevant in the wake of the UCP Directive, which integrates a large part of the Misleading Advertising Directive within its scope, and there seems to be no reason why the Court's reasoning could not be transposed to aggressive commercial practices so as to cover all unfair commercial practices. It remains that the distinction between health and economic interests is far from straightforward. The example of the Happy Meal mentioned above shows how difficult it may be to put the distinction into practice.

3.2. Full as opposed to minimum harmonisation

This distinction is nonetheless all the more important as the UCP and the TVWF Directives do not rely on the same harmonisation techniques. As stated above, the TVWF Directive is a measure of minimum harmonisation which allows Member States to adopt more protective measures in the coordinated fields covered by the Directive (at least in relation to domestic broadcasts). By contrast, the UCP Directive is a measure of full harmonisation,²⁶ which does not grant any discretion to Member States to adopt requirements going beyond its provisions. The primary aim of the UCP Directive clearly is market integration; this is why the Commission has chosen to depart from the method of minimum harmonisation relied on so far in the field of consumer protection. The Preamble states that the UCP Directive aims at a “high level of convergence” that will “considerably increase legal certainty” so that “businesses and consumers are able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU.”²⁷ Furthermore, the only reference to minimum harmonisation in the UCP Directive is in Article 3(5) which allows Member States “to continue to apply

²⁶ Full harmonisation is also referred to as total, maximum or exhaustive harmonisation.

²⁷ Recitals 11 to 15.

national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses” until 12 June 2013.²⁸ However, this derogation is available only for measures which are “essential to ensure that consumers are adequately protected against unfair commercial practices” and “proportionate to the attainment of this objective”, which raises difficult interpretation questions. Only measures relating to financial services and immoveable property are not subject to a full harmonisation requirement.²⁹

As regards advertising directed at children, the move from minimum to full harmonisation further complicates the issue. It appears, at least at first sight, that the method relied differs depending on whether the advertising is television broadcast or not. In the first case, it could be argued that it is still open to Member States to lay down stricter requirements, subject to the State of establishment principle, as the TVWF Directive is a measure of minimum harmonisation. Sweden, for example, should therefore continue to be able, on this basis, to maintain its ban on all television advertising directed at children of less than twelve years old if it is transmitted by a broadcaster established in Sweden, subject to compliance with Articles 28 and 49 EC. This will be extended to several other media once the AVMS Directive enters into force. For the media that will not be covered by the AVMS Directive, national law retains competence.

In the event that the advertising under consideration raises concerns because it may be an unfair commercial practice, then Sweden or any other Member State is prevented from banning children advertising on the basis of the wording of the UCP Directive itself. Indeed, if it acknowledges that the special needs of vulnerable consumers such as children should be taken into account, it also provides in Recital 18 that there should be no outright ban on advertising directed at children; and as the UCP Directive is a measure of full harmonisation, Member States do not have the freedom to adopt stricter national standards banning such advertising.

²⁸ No indication is given of what is meant by “approximated field”.

²⁹ Article 3(9).

Even if Recital 18 is not reflected in the main body of the Directive, the wording it uses is nonetheless likely to exacerbate the controversy whether the Swedish ban on television advertising may stand following the entry into force of the UCP Directive in Sweden. One might argue that the Swedish ban is neither “essential” nor “proportionate” to the objective of protecting children’s commercial interests – one of the requirements of Article 3(5). One would counter argue, however, that the evidence suggests otherwise. As stated above, Ofcom’s new rules on children advertising of HFSS food have been adopted, following extensive consultation and independent surveys, on the ground that a ban constituted a proportionate response to the obesity epidemic. Moreover, the UCP Directive explicitly states that it is without prejudice both to Community or national rules relating to the health and safety aspects of products and to Article 16 of the TVWF Directive. It remains that the ambiguous wording of Article 3(5) of the UCP Directive, combined with Recital 18 of the Preamble and Point 28 of Annex I, is likely to give rise to difficult questions of interpretation for Member States and for the European Court of Justice. And the difficulties do not stop here...

3.3. More specific legislation on food labelling

A measure may only fall within the scope of the UCP Directive if it does not fall within the scope of more specific legislation. Article 3(4) of the UCP Directive provides that “in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.” The UCP Directive therefore is a horizontal directive which “complements the Community *acquis* on commercial practices harming consumers’ economic interests” and “which provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression on the nature of products.”

It is therefore necessary to consider whether there are provisions regulating specific aspects of unfair commercial practices relating to the advertising of HFSS food to children.

As stated above, the UCP Directive defines two main categories of unfair commercial practices: misleading and aggressive commercial practices. In relation to the latter category, no specific text is applicable, beyond the TVWF Directive. It may nonetheless be argued that the frequent practice of bombarding children with advertising for HFSS food is likely to materially distort their economic behaviour and, as such, falls within the scope of the UCP Directive (and Point 28 of Annex I more specifically). This has already been discussed.

As far as misleading food advertising is concerned, Directive 2000/13 regulating the presentation, labelling and advertising of foodstuffs³⁰ is more specific and should be preferred over the UCP Directive.³¹ In particular, Article 2 provides that the labelling and methods used must not be such as could mislead the purchaser to a material degree and lists some of the factors which should be taken into account when assessing whether that is the case.

National courts and authorities have found it difficult to decide, on the basis of their national implementing laws whether specific advertising methods of a particular foodstuff are “such as could mislead the purchaser to a material degree”. One example is particularly telling, as it involved the marketing of the same foodstuff in France and in the Netherlands. The question arose in both countries whether *Haribo* had misled consumers by claiming that its *Chupa Chups* fruit lollypops were “fat free”. The Dutch Advertising Standards Committee decided that the claim was misleading on the ground that if the lollypops contained 0% fat, it was because they were full of sugar. It was therefore decided that *Chupa Chups* gave the misleading

³⁰ OJ 2000 L 109/29.

³¹ In Joined Cases C-421/00, 426/00 and 16/01 *Sterbenz and Haug* [2003] ECR I-1065, the European Court of Justice noted that the Labelling Directive laid down “a specific provision intended to prevent fraud which must consequently be interpreted as a special rule in relation to the general provisions on protection against misleading advertising laid down in Directive 84/450 [...]”, at paragraph 25. See also Case C-221/00 *Commission v Austria* [2003] ECR I-1007, at paragraph 43, and Case 99/01 *Linhart and Biffl* [2002] ECR I-9375, at paragraphs 19 and 20.

impression that the lollypops were healthy products.³² By contrast, the Paris Court of Appeal decided that similar food products did not only include fruit lollypops but also milk, caramel and chocolate lollypops, and that the claim that the fruit lollypops were fat free enabled consumers to distinguish them from other kinds of lollypops. The claim was therefore held to be lawful.³³ This example shows how uncertain it is to decide such issues on the basis of general provisions on misleading advertising and food labelling. As a result, some flesh has recently been added to the bones of the existing legislative framework following the adoption of a specific regulation on the use of nutrition and health claims made on food.

Nutrition claims are those used on labels or in advertising/marketing campaigns, which make an assertion about a particular nutritional property of a food, such as “high in fibre”, “low in fat”, “no added sugar”... Health claims are those which maintain that there is a relationship between a specific food and improved health, such as “calcium is good for your bones”, or that a food can reduce the risk of a particular disease, such as “lowers the risks of heart attacks”.

The rationale for Regulation 1924/2006³⁴ is that consumers should be able to rely on clear and accurate information, as nutrition and health claims are not mere expressions of opinions; rather, they are to be treated as objective statements that influence the physical and mental health of the user, as well as his/her eating decisions and consumption patterns. The need for regulation is all the more compelling as such claims tend to be made on branded foods which are more pre-processed than unbranded foods (on chips rather than on raw potatoes, for example) and play a larger role in rising obesity rates (Hawkes 2004b).³⁵ It is consequently not

³² Decision at first instance: *Reclame Code Commissie*, 10 June 2003, IER 2003/78; appeal: *College van Beroep*, 12 January 2005, IER 2005/32.

³³ Decision of 1st August 2003.

³⁴ OJ 2006 L 404/9.

³⁵ The need for regulation was reinforced by two further considerations. Firstly, cost-benefits analyses suggest that savings in health care costs are relatively greater than the costs incurred by labelling regulation. Secondly, the laws of the Member States

surprising that the Community legislature has insisted that the Regulation ties in with the EU campaign for healthier lifestyle choices, as well as with the general perception that consumers must be well informed about the goods and services they buy across the EU.³⁶

The Regulation lays down the overriding principle that nutrition and health claims may only be used if they are not misleading³⁷ and if they are scientifically substantiated.³⁸ In particular, consumers must be expected to understand the beneficial effects of a food as expressed in the claim, and the quantity of the product that can reasonably be expected to be consumed must provide a significant quantity of the substance to which the claim relates.³⁹ Moreover, “the use of nutrition and health claims shall not encourage or condone excess consumption of a food” or “state, suggest or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients in general”.⁴⁰

Nutrition claims will only be authorised if they respect precise and quantifiable values, as listed in the Annex to the Regulation.⁴¹ For example, a claim that a food is low in fat may only be made “where the product contains more than 3 g of fat per 100 g for solids or 1.5 g per 100 ml for liquids (1.8 g of fat per 100 ml for semi-skimmed milk). Similarly, a positive list of health claims other than those referring to the reduction of a disease risk will be drawn up by the Commission, on the basis of claims submitted by Member States. These health claims will then be allowed on labels, provided that the producer can verify the link between the claim and a given

relating to food claims varied greatly from one Member State to another, which made them potentially trade restrictive.

³⁶ Recitals 10 and 28 of Regulation 1924/2006.

³⁷ Article 3.

³⁸ Article 6. The burden of proof that a claim is scientifically justified rests with the food business operator.

³⁹ Article 5.

⁴⁰ Article 3.

⁴¹ Article 8.

product.⁴² For health claims referring to the reduction of a disease risk, authorisation will need to be requested on a case-by-case basis, following the submission of scientific evidence to the European Food Safety Authority (“the EFSA”) for assessment.⁴³ The Commission will maintain a Community register of nutrition and health claims made on food which shall include a list of permitted nutrition and health claims together with the conditions/restrictions applying to them, as well as a list of rejected health claims and the reasons for their rejection.⁴⁴

Last but not least, foodstuffs that do not have a set nutrient profile because they are HFSS food will not be allowed to carry any health or nutrition claims. It will therefore limit the communication of nutritional or health benefits of foods with an undesirable overall nutrition profile, such as *Chupa Chups* lollypops.⁴⁵ The aim is to eliminate misinformation by limiting the possibilities to advertise HFSS food as healthy. Article 4 should therefore provide an incentive to the food industry to develop and market healthier products than it has done so far, thus leaving room for innovation. Nutrient profiles will be based on the scientific opinion of the EFSA. The Commission will then consult the relevant stakeholders and present proposals for nutrient profiles to Member States experts in the Standing Committee on the Food Chain and Animal Health.⁴⁶ If this Committee backs the proposed nutrient profiles, they will be adopted by the Commission and will enter into force following their publication. Sharing expertise on designing nutrient profiling models is a welcome move, as it will help ensure that such models are widely accepted by all interested parties, including the food industry itself. Such work should inspire the food industry

⁴² Article 13.

⁴³ Article 14.

⁴⁴ Article 19.

⁴⁵ Article 4.

⁴⁶ Certain Member State authorities have already carried out extensive work on the question of nutrition profiling; see in particular the work of the FSA in the United Kingdom, on the basis of which Ofcom has relied to tighten controls of HFSS food advertising to children. For more information on the model developed by the FSA, see:

<http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/>

when drafting codes of conduct relating to HFSS food advertising, in particular to children.

All nutrition and health claims made on food in commercial communications are to be regulated by the Regulation, which is more specific than the UCP Directive. Member States will not be able to restrict or forbid the advertising of foods which comply with its provisions by applying non-harmonised national provisions governing claims made on certain foods or on foods in general.⁴⁷ This confirms that the Regulation is a measure of full harmonisation which prevents Member States from adopting stricter national standards.

It remains that the Regulation largely rests on the assumption that consumers are able to make adequate food choices and develop a critical attitude towards food labelling and advertising if they are given accurate information. Such an approach, however, may only be effective if consumers are sufficiently educated to process the information provided and adopt healthier diets as a result. The extent to which vulnerable consumers such as children can derive tangible health benefits on the basis of such legislation remains to be seen. One can hope that their parents will make healthier choices on their behalf on the basis of improved nutrition information. This confirms, in any event, that action on food marketing must be part of an integrated approach that tackles rising rates of obesity at a population level, for example through the regulation of food advertising and food labelling, as well as by targeting various categories of consumers with nutrition education policies suited to their particular needs. Such policies should rely on adapted public health campaigns, school curricula, community based actions...

Conclusion

Food advertising directed at children is subject to various texts of Community and national law, depending on the factual scenario at stake (medium used, practice at

⁴⁷ Article 21.

stake, interest to be protected...). That situation makes the legal landscape very difficult to understand, despite the Commission's express intention to simplify this landscape, so as to reduce fragmentation and consequently increase legal certainty for consumers and business operators alike.

What remains striking, however, is that all relevant texts appear to consider each advert separately, despite the fact that when it comes to HFSS food advertising, the detrimental effect on children's health comes above all from the repetitive exposure to food advertising, rather than from the exposure to one isolated advertising spot. This is why both the UCP and the TVWF/AVMS Directives have missed, so far, the opportunity to adequately tackle an important aspect of childhood obesity. A more goal-oriented approach is required to deal efficiently with this major public health issue. Not only are Community rules on food advertising directed at children very difficult to articulate, but they also fail to convince in terms of their effectiveness.

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